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IN THE

Supreme Court of the United States

October Term, 1963

No. 138

WILLIAM MURPHY and JOHN MOODY, SR.,
Petitioners,

vs.

THE WATERFRONT COMMISSION OF
NEW YORK HARBOR,
Respondent.

On Writ of Certiorari to the Supreme Court of New Jersey

BRIEF OF NATIONAL DISTRICT ATTORNEYS' ASSOCIATION, *AMICUS CURIAE*

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BRIEF OF NATIONAL DISTRICT ATTORNEYS' ASSOCIATION, *AMICUS CURIAE*

Question Presented

May a witness in a state proceeding who receives immunity from prosecution by the state refuse to testify on grounds of possible incrimination under federal penal statutes?

Interest of *Amicus* and Summary of Argument

The National District Attorneys' Association is an interstate organization of local prosecutors, devoted to improving the quality of law enforcement in the states. On October 15, 1963, the Association, as *amicus curiae*, filed with this Court a brief in the case of *Malloy* v. *Hogan*, No. 110, October Term, 1963. *Malloy* raises the question whether due process [U.S. CONST. AMEND. XIV] obliges the states to afford witnesses in state proceedings a privilege that is equivalent to the privilege against self-incrimination of the Fifth Amendment. The Association's brief in *Malloy* concerned a matter not directly raised by the parties, possible implications of *Malloy* for state immunity statutes. We stated that whatever the Court's resolution of the question in *Malloy*, the effectiveness of state immunity statutes should remain unimpaired, because the two matters are distinct.

In the same week that the Association filed its brief in *Malloy*, this Court granted certiorari in the case at bar, and ordered oral argument immediately following the argument in *Malloy*. The Association supports the position of respondent in the instant case. Were petitioners' claim to prevail, and clear and controlling precedents thereby overruled, vital state prosecutions would be disastrously impaired. On the other hand, rejection of petitioners' claim, and reaffirmation of present law, entails no unfairness or prejudice to basic rights. This is demonstrated by the experience with state immunity statutes in a representative community, New York City, since this Court's last pronouncement on the issue.

ARGUMENT

The court should preserve the effectiveness of state immunity statutes by reaffirming its previous holdings that a witness in a state proceeding who receives immunity from prosecution by the state may not refuse to testify on grounds of possible incrimination under federal criminal statutes.

(a) The present rule as to self-incrimination in a federal system

A privilege against self-incrimination is contained in the constitutions of forty-eight states, and in the statutes or common law of the remaining two [see 8 Wigmore, EVIDENCE §2252, n. 3 (McNaughton rev. 1961); 58 AM. JUR., *Witnesses* §36; Kroner, *Self Incrimination: The External Reach of the Privilege*, 60 COL. L. REV. 816, nn. 4-7 (1960)]. To protect these privileges without sacrificing urgent investigations of crime, every state has passed statutes that grant immunity from prosecution for any state crime revealed by a witness, in exchange for the witness's testimony [see Wigmore, *supra*, §2281, n. 11]. State courts have consistently held that by precluding prosecution by the state, an "immunity statute" effectively supplants the privilege against self-incrimination [see Wigmore, *supra*, §2281; Note, 38 A. L. R. 2d 225].

A state is powerless, however, to give witnesses immunity from prosecution beyond its jurisdiction—in federal courts, or in other states [*Knapp* v. *Schweitzer*, 357 U. S. 371 (1958); *Jack* v. *Kansas*, 199 U. S. 372 (1905)]. While there are few state decisions directly concerning

the power of a state to compel testimony that may incriminate under the laws of another state, many state courts have passed upon claims of possible incrimination under federal laws. In the latter cases, the state's power to compel testimony is generally upheld [see Wigmore, *supra*, §2258, n. 6; Kroner, *op. cit. supra*, pp. 827-835; 58 AM. JUR., *Witnesses*, §§51, 89; Notes, 38 A. L. R. 2d 225; 82 A. L. R. 1380; 59 A. L. R. 895].

This situation first came before the Supreme Court in *Jack* v. *Kansas*, *supra*. Jack, a witness in a state investigation of violations of the state anti-trust act, refused to answer questions under a grant of immunity, and alleged possible incrimination under federal anti-trust laws. His conviction for contempt was upheld by this Court, over his claim of deprivation of due process under the Fourteenth Amendment. The principle was reasserted in *Knapp* v. *Schweitzer*, *supra*. In that case, an employer in a business in interstate commerce refused to testify in a state grand jury investigation of labor corruption, despite a grant of immunity, on the ground that the state did not protect him against federal prosecution under the National Labor-Management Relations Act of 1947. *Knapp* v. *Schweitzer* has since been reaffirmed [see *Mills* v. *Louisiana*, 360 U. S. 230 (1959); *Slagle* v. *Ohio*, 366 U. S. 259 (1961)].

(b) Experience in one community under the present rule

The grant of the instant writ of certiorari implies a reexamination of these decisions. Their primary basis, it may be recalled, was the "historic distribution of power as between Nation and States in our federal system" [see

Knapp v. *Schweitzer, supra* at 375]. In the opinion of a majority of this Court, to accept a state witness's claim of possible incrimination under federal statutes, in "these days of the extensive sweep of such federal statutes as the income tax law," would be largely "to withdraw from the states their traditional power to investigate in aid of prosecuting conventional state crimes" [*id.* at 375-375, 378-379].

This reasoning is utterly confirmed by the following review of the use of immunity statutes in criminal proceedings in one community, New York City, in the two-and-one-half years since the last of these decisions was rendered [see *Slagle* v. *Ohio, supra*]. The five counties of New York City, with their mercantile, financial, industrial, political and residential complexes, provide fitting examples of the problems of law enforcement faced in communities across the country. The discussion includes all or substantially all reasonably discoverable cases in which criminal convictions were obtained through use of immunity statutes, and federal penal laws touched the field of inquiry.

Commercial larceny

During the time in question, several important larceny cases were solved in New York City with grants of immunity. A New York County grand jury investigated a sensational theft of $1,370,000 in securities from the New York office of Bache & Co., a nationwide firm of stockbrokers. Immunity was given to an accomplice in the plot, pursuant to a statutory authorization for immunity to witnesses in investigations of criminal conspiracies [see N. Y. PENAL L. §584] and a general provision for immunity before

grand juries [see N. Y. PENAL L. §2447(1), (2), (3c)]. As a result of the inquiry, almost all the stolen stock was recovered, two of the principals pleaded guilty to larceny charges [*People* v. *Dodge* (Sup. Ct. N. Y. Co., Oct. 2, 1962), in N. Y. Times, Oct. 3, 1962, p. 44, col. 3; *People* v. *Pomeranz* (Sup. Ct. N. Y. Co., Oct. 31, 1962), in N. Y. Times, Nov. 1, 1962, p. 41, col. 7], and the third was found guilty of forgery after trial [*People* v. *Gorlitzky* (Sup. Ct. N. Y. Co., Oct. 17, 1962), *appeal pending*; in N. Y. Times, Oct. 18, 1962, p. 29, col. 4]. A successful claim by the immunized witness of possible incrimination under federal statutes would have prevented these results; because of the elaborate plans for the disposal of the stocks in interstate commerce, the witness implicated herself under federal statutes relating to transportation and disposal of stolen and forged securities [see 18 U. S. C. §§2314, 2315], and might also have claimed incrimination under federal income tax laws [see 26 U. S. C. §§7201, 7206, 7207].

In an analogous case, a New York County grand jury investigating a theft of $250,000 in stocks granted immunity to an accomplice of the two suspects, who subsequently were indicted and pleaded guilty [*People* v. *Damato* (Gen. Sess. N. Y. Co. May 16, 1962), in N. Y. Times, Oct. 4, 1961, p. 31, col. 5]. The witness had participated in the defendants' scheme to forge endorsements on the stolen securities, and dispose of the stocks by setting up, through use of the mails, brokerage accounts in fictitious names. Thus, the investigation would have been obstructed if the witness had been able to invoke the federal laws prohibiting use of the mails to defraud [see 18 U. S. C. §1341], fraudulent use of a fictitious name or address in mailed corre-

spondence [see 18 U. S. C. §1342], disposal of stolen or forged securities, and income tax evasion.

In a similar case, checks worth $61,540 were stolen from the mail of a Manhattan financial firm. In the ensuing grand jury investigation, three co-conspirators received immunity. The plan that was uncovered involved forging endorsements on the stolen checks, and depositing the checks in false bank accounts. The two defendants later pleaded guilty to various charges [*People* v. *Scherl* (Sup. Ct. N. Y. Co. Sept. 26, 1962; Indictment 2156-62)]. Associated federal laws included statutes relating to mail theft, receipt of stolen mail [see 18 U. S. C. §1708], receipt and disposal of checks stolen in interstate commerce, receipt and disposal of forged checks [see 18 U. S. C. §2315], and tax evasion.

Fraud in public works and housing

Prosecutions for major crimes against public agencies have provided another setting for the conferral of immunity. A scheme by several plumbing contractors to rig bids on school construction contracts [see N. Y. PENAL L. §581-a], which cost the taxpayers an estimated $250,000, was uncovered with the help of grants of immunity to a co-conspirator and several employees. These essential witnesses might have thwarted the inquiry by citing federal statutes prohibiting restraint of trade [see 15 U. S. C. §1] or evasion of income taxes. The six defendants pleaded guilty, and the city received substantial restitution [*People* v. *Rehner* (Queens Co. Ct. Jan. 19, 1962), in N. Y. Times, Aug. 6, 1961, p. 54, col. 3; *id.*, Jan. 20, 1962, p. 11, col. 6; *id.*, June 1, 1962, p. 1, col. 7].

Devices by landlords to evade local rent control laws [see N. Y. Uncons. L. §§8581-8597] were also prosecuted successfully by grants of immunity. The basic scheme was fraudulently to obtain from the public Commission that administered the rent control program certain orders permitting rent increases, by submitting to the Commission false invoices from contractors representing that various improvements had been performed on the premises. The orders were then mailed to the tenants, who paid the landlords increased rents. In one investigation, a contractor's employee, who received immunity, described how the contractor had prepared two sets of bills, one for contracts performed, the other for fictitious work. Seven landlords, suppliers and employees were convicted, on pleas of guilty, under indictments alleging perjury, grand larceny, submission of false applications [see N. Y. Uncons. L. §8591; N. Y. Penal L. §2051], and related crimes [*People* v. *Cantor* (Bronx Co. Ct. Apr. 29, 1963); *People* v. *Teichler* (Bronx Co. Ct. May 13, 1963); *People* v. *Raphel* (Bronx Co. Ct. May 28, 1963); in N. Y. Times, Aug. 22, 1962, p. 1, col. 1; *id.*, Oct. 20, 1962, p. 28, col. 4]. Similar convictions were obtained through grants of immunity to a contractor [*People* v. *Parkoff* (Kings Co. Ct. Sept. 9, 1963), in N. Y. Times, Nov. 6, 1962, p. 67, col. 1] and a landlord [*People* v. *Mirrer* (N. Y. C. Crim. Ct. June 21, 1963), in N. Y. Times, Apr. 24, 1962, p. 34, col. 2]. As a result of these city-wide investigations, countless tenants obtained deserved reductions in rents [see N. Y. Times, Aug. 29, 1962, p. 31, col. 8]. Again, federal income tax laws, as well as statutes concerning use of the mails to defraud, might have been cited by the witnesses.

Consumer frauds

The versatility of state immunity statutes, and the breadth of federal jurisdiction, are also illustrated by two recent investigations of fraudulent trade practices in the retail clothing industry. In June, 1962, after an extensive inquiry, a grand jury uncovered a clever scheme to make "going out of business" a profitable business. A quality men's clothing chain, long established in the community, applied for a license to run a "going out of business sale" in connection with the closing of its stores. As local law required, the proprietors prepared a sworn application for a license to conduct the sale [see N. Y. C. ADMIN. CODE §B32-207.0]. To show that the merchandise to be offered for sale was their regular inventory, not goods purchased especially for the sale, the merchants submitted to the New York City Department of Licenses invoices and letters obtained from clothing manufacturers, representing that the purchases had occurred months before the sale was contemplated, and indicating that the clothing was of the customary high quality. The license was issued, and the store unleashed a barrage of enticing advertising by radio, mail and newspapers [*cf.* N. Y. Times, Oct. 27, 1961, p. 17; *id.*, Nov. 2, 1961, p. 27], suggesting that because the stores were closing, regular inventory was now available at greatly reduced prices. In the shops, tags on the closing showed that the "original" prices had been drastically cut. The sale grossed over $1,000,000. In the grand jury, the clothing manufacturers, testifying under immunity, revealed that they had falsely pre-dated the orders, that clothing sold for $800,000 was purchased just before the sale, and that in many instances

the merchandise constituted cheap goods below the store's regular standards. Two other witnesses testified under immunity that the retailers had engaged them to obtain the license, purchase the clothing, and promote the sale. The merchants subsequently pleaded guilty to appropriate charges, a high official of the Department of Licenses was dismissed in connection with the case, and licensing procedures were revamped [*People* v. *Litt* (N. Y. C. Crim. Ct. March 15, 1963), in N. Y. Times, June 7, 1962, p. 70, col. 5]. The exposure of the scheme, and protection of the New York consumer, would have been blocked had the manufacturers and promoters been able to remain silent—a likely result under the instant petitioners' contention, in view of federal statutes concerning deceptive labeling of wool products [see 15 U. S. C. §§68a, 68b(a)(1), 68h], using radio in a scheme to defraud or obtain money by false promise [see 18 U. S. C. §1343], use of the mails to defraud, and income tax evasion.

Because of the same federal statutes, an investigation under the false advertising statute [see N. Y. PENAL L. §421] of the advertising of a large New York department store, S. Klein, also would have been fruitless if petitioners' view had been law. Dramatic advertisements in major New York newspapers represented that Klein's had purchased clothing from a "renowned clothier," and was selling the goods at reduced prices with the clothier's "famous label" [*cf.* N. Y. Times, Oct. 13, 1961, p. 12]. Through grants of immunity to the clothiers and other witnesses, it was established that most of the goods in the sale had been purchased by Klein's buyers directly from the manufacturers, who shipped them to Klein's, and that the clothing

was largely of inferior quality. Several manufacturers were subsequently convicted of perjury, on their pleas of guilty, for falsely telling the grand jury that they had sold the goods to the clothiers, not to Klein's, and the scheme was exposed to the public [*People* v. *Largever, People* v. *Siller* (Sup. Ct. N. Y. Co. Dec. 6, 1963); *People* v. *Weiner, People* v. *Kanner* (Sup. Ct. N. Y. Co. Dec. 20, 1963); *People* v. *Lobel* (Sup. Ct. N. Y. Co. Jan. 31, 1964); in N. Y. Times, Oct. 18, 1963, p. 64, col. 1].

Protection of local consumers was again afforded by an investigation of fraudulent sales of houses, in which the promoters duped numerous purchasers with false evidence of compliance with local housing codes. Complaints of buyers whose houses had become uninhabitable, and a grant of immunity to a contractor, led to the conviction, after trial, of a major promoter for grand larceny [*People* v. *Powell* (Kings Co. Ct. Sept. 6, 1963), in N. Y. Times, Sept. 7, 1963, p. 48, col. 4]. Federal statutes in this area included the prohibitions against submitting false statements to the Federal Housing Administration to obtain credit [see 18 U. S. C. §1010], and evasion of income taxes.*

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*After judgment, the defendant received immunity in return for his testimony in a grand jury inquiry into apparent widespread bribery of building inspectors and other officials. His subsequent refusal to testify on grounds of incrimination under the federal housing and bribery statutes [see 18 U. S. C. §§201, 1010] resulted in his conviction for contempt, but has blocked a significant investigation. *Amicus* is informed that the defendant is now in the process of petitioning this Court for a review of the contempt proceedings [*Matter of Kings County District Attorney* v. *Powell* (Kings Co. Ct. Nov. 13, 1963), *aff'd* —— App. Div. 2d ——, N. Y. L. Jour. Jan 2, 1964, p. 14, col. 2 (2nd Dept. Dec. 30, 1963), *leave to appeal denied* (DESMOND, C.J.) Jan. 23, 1964].

Commercial bribery

Still another crime, corruption of employees to influence their conduct in relation to their employer's business [see N. Y. PENAL L. §439], commonly known as "commercial bribery," has been prosecuted with the help of immunity, which is specifically authorized in such cases [N. Y. PENAL L. §439(2)]. Two officers of a prominent charitable organization, the Muscular Dystrophy Association, were convicted, on their pleas of guilty, of accepting sizeable kickbacks from a printer, for favoring the printer with the charity's extensive printing contracts. A grant of immunity to the printer enabled the prosecution, and the ensuing protection to the organization's contributors and beneficiaries [*People* v. *Pagan* (N. Y. C. Crim. Ct. Feb. 17, 1963)]. An extensive investigation of "payola" to New York disc jockeys, several of whom pleaded guilty or were convicted after trial, also involved grants of immunity to the payers, manufacturers and distributors of phonograph records [*People* v. *Freed* (N. Y. C. Crim. Ct. Dec. 17, 1962), in N. Y. Times, Dec. 18, 1962, p. 3, col. 1; *People* v. *Tripp* (Spec. Sess. N. Y. C. Oct. 16, 1961), in N. Y. Times, Oct. 17, 1961, p. 27, col. 3; *id.*, Apr. 18, 1961, p. 45, col. 1; *id.*, May 20, 1960, p. 1, col. 3]. If the witnesses who received immunity in these cases of commercial bribery could have refused to testify on grounds of implication under federal tax laws, the benefits of these investigations would have been needlessly lost.

Gambling and racketeering

Immunity is often conferred as a necessary aspect of investigations of gambling, racketeering and official corruption [see N. Y. PENAL L. §§380, 381, 996]. Widespread fix-

ing of college basketball games by gamblers was exposed in an exhaustive inquiry, involving twenty-five colleges across the country, and forty-nine players. Several defendants pleaded guilty of charges of conspiracy to bribe, and bribery of, participants in sports [*People* v. *Tucker* (Gen. Sess. N. Y. Co. Jan. 18, 1962), in N. Y. Times, Jan. 19, 1962, p. 41, col. 7; *People* v. *Green* (Gen. Sess. N. Y. Co. Nov. 27, 1961), in N. Y. Times, June 20, 1961, p. 1, col. 4; *id.*, Nov. 28, 1961, p. 25, col. 5; *People* v. *Wagman* (Gen. Sess. N. Y. Co. Nov. 29, 1961), in N. Y. Times, Nov. 30, 1961, p. 49, col. 4; *People* v. *Hacken* (Gen. Sess. N. Y. Co. Feb. 7, 1962), in N. Y. Times, May 25, 1961, p. 1, col. 4; *id.*, Feb. 8, 1962, p. 18, col. 1; see N. Y. PENAL L. §§382, 580], and another was convicted after trial [*People* v. *Molinas* (Sup. Ct. N. Y. Co. Feb. 11, 1963), *appeal pending;* in N. Y. Times, May 18, 1962, p. 64, col. 1; *id.*, Jan. 10, 1963, p. 16, col. 3; *id.*, Feb. 12, 1963, p. 4, col. 6]. The prosecutions would have been impossible without grants of immunity to the numerous players, and to one of the gamblers. If the instant petitioners were correct, these witnesses could have disrupted the investigation by claiming risk of incrimination under the pervasive federal laws concerning income tax evasion, and traveling in or using facilities in interstate commerce to carry on or distribute proceeds of a gambling enterprise [see 18 U. S. C. §§1952, 1084].

A protracted investigation of a loan shark racket in the New York City garment center [see N. Y. Times, Sept. 9, 1960, p. 59, col. 4; *id.*, Oct. 21, 1960, p. 44, col. 6] led to convictions for extortion [*People* v. *DeFillippo* (Sup. Ct. N. Y. Co. Nov. 26, 1963); *People* v. *Comparetti* (Sup. Ct. N. Y.

Co. Nov. 19, 1963)] and usury [*People* v. *Magliato* (N. Y. C. Crim. Ct. Mar. 21, 1963); see N. Y. BANKING L. §357]. A grant of immunity to the defendants' accountant enabled the latter prosecution. This witness could have asserted possible incrimination under federal tax evasion laws, and perhaps even under the broad statute that forbids affecting interstate commerce by extortion [see 18 U. S. C. §1951].

Professional misconduct

The soundness of the rationale of *Knapp* v. *Schweitzer, supra*, is further demonstrated by such diverse cases as a prosecution of a New York negligence attorney for suborning witnesses at a disciplinary inquiry into his practice. He had obtained insurance benefits for numerous clients by submitting false claims of injury, and supporting the claims with bogus medical reports from doctors with whom he had connived. He then induced the clients and a doctor to lie at the disciplinary hearing. His conviction for subornation would have been impossible without grants of immunity to the doctor and clients, all of whom could have claimed incrimination under federal income tax laws [*People* v. *Sparber* (Gen. Sess. N. Y. Co. May 9, 1962), *aff'd* —— App. Div. 2d ——, N. Y. L. JOUR., Feb. 19, 1964, p. 16, col. 3 (1st Dept. Feb. 18, 1964), in N. Y. Times, May 9, 1962, p. 74, col. 7]. The same may be said of the prosecution of another negligence attorney for ambulance chasing [see N. Y. PENAL L. §270-a]. In this case, one of many arising from investigations of the automobile towing business [see N. Y. Times, Feb. 8, 1961, p. 22, col. 3; *id.*, April 13, 1961, p. 28, col. 3], the operator of a towing truck testified under immunity that the defendant had hired him to make on-the-spot referrals of victims of traffic accidents, in

return for a percentage of the attorney's fees [*People* v. *Corsover* (N. Y. C. Crim. Ct. Nov. 3, 1961), *aff'd* 18 App. Div. 2d 1137 (1st Dept. 1963), *leave to appeal denied* (FULD, J.) May 21, 1963; in N. Y. Times, Sept. 29, 1961, p. 26, col. 8; *id.*, Sept. 30, 1961, p. 26, col. 1; *id.*, Oct. 7, 1961, p. 14, col. 7; *id.*, Nov. 4, 1961, p. 6, col. 5].

(c) The reasonableness of the present rule

In each of these cases, immunity from prosecution was conferred as an essential element of responsible law enforcement. While in every instance federal criminal statutes touched the field of inquiry, this was due to the remarkable breadth and comprehensiveness of federal statutes; the prosecutions involved primarily local matters, and could not reasonably have been delegated to federal agencies. The review also indicates that the state prosecutions where a federal law overlaps are usually major cases, in which the public interest would be seriously prejudiced by a refusal to testify. Against this background of public concern, it is absurd to contend, as petitioners do (brief, p. 47), that a "simple" solution to the issues at bar is the abandonment by the state of its investigations.

Petitioners' view is further refuted by the subsequent history of the cases discussed above. There is no record of criminal prosecution by the federal government of any of the witnesses who received immunity in these investigations. Although in *Feldman* v. *United States* [322 U. S. 471 (1944)] this Court held, in a 4-3 decision, that self-incriminating testimony compelled under a state immunity statute is admissible at a federal criminal trial, apparently the *Feldman* decision has been used sparingly by federal prosecutors.

Moreover, as has been suggested by several members of this Court [see *Knapp* v. *Schweitzer*, 357 U. S. 371, 381, 382, 384 (1958); *Mills* v. *Louisiana*, 360 U. S. 230-231, 233-234, 238-239 (1959)], the Association in its *amicus* brief in *Malloy* v. *Hogan*, and the Attorney General of the State of New York, *amicus curiae* in the instant case, *Feldman* can properly be overruled. Not only may the state-compelled testimony be excluded from federal court, but if the witness is prosecuted in a federal court, a hearing may be held there to determine whether the government's evidence includes "fruits" of the testimony (see brief of N. Y. Att'y Gen.). In short, the equivocal holding of *Feldman* should not be considered a bar to valuable state investigations.

Thus, experiences with the rule of *Knapp* v. *Schweitzer* establish its necessity to vital public interests, the absence in the past of undue prejudice from its application, and the availability in the future of convenient measures for eliminating the risk of its abuse. A comparison with the decisions of this Court in the field of search and seizure is suggested. In *Mapp* v. *Ohio* [367 U. S. 643 (1961)], to determine whether the established right of a citizen of a state to be free from unreasonable searches and seizures [see *Wolf* v. *Colorado*, 338 U. S. 25 (1948)] required exclusion from evidence in a state court of material obtained by an unreasonable search, this Court reviewed the experience in the states under the previous rule. Each of the considerations reviewed in *Mapp* supports the existing law as to state immunity statutes. First, in *Mapp*, the Court found widespread abuse of substantial rights under the existing rule. But the situation is otherwise here, because federal use of the state-compelled testimony is rare. Sec-

ondly, in *Mapp* the remedies available to the citizen, such as civil suits for trespass, were found inadequate to preserve his rights; their deterrent effect on lawless law enforcement was slight. Here, with the state procedures lawful, there is no improper state action to deter. In addition, an effective remedy to possible harm can be afforded the witness in the few situations where a remedy is necessary: exclusion of his testimony and its fruits from federal courts. Finally, in *Mapp* the Court referred to an alternative available to the state; in many cases, through greater diligence and expense, the state authorities could preserve the investigation by obtaining a warrant or otherwise justifying the search. In the instant situation, the state gives the witness every protection within its power. Since the witness's testimony is usually essential to the prosecution, there is no alternative, except abandonment of an important inquiry.

In sum, this case places on the scales a speculative, intangible risk to the witness—one easily avoidable through appropriate remedies—and certain, substantial injury to the public. Proper balancing of these interests forbids premature acceptance of the witness's claim, in the context of the state investigation; the claim should be deferred until it can be judged in the proper setting, a federal prosecution.

CONCLUSION

The judgment below should be affirmed, and this Court's holdings—that a witness in a state proceeding who receives immunity from prosecution by the state may not refuse to testify on grounds of possible incrimination under federal statutes—should be reaffirmed.

Respectfully submitted,

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